to how a charge should be framed. (See also *Public Prosecutor* v. *Lim Yoo Hock*[4].)

Then again, when the prosecuting officer gives the facts relating to the charge implicating the accused where the accused has pleaded guilty, the magistrate should be vigilant to see that the facts make out the ingredients relating to the charge and where the accused states facts which show that one or more of the essential ingredients have not been made out, then notwithstanding the plea of guilty, the magistrate should reject the plea and fix a date for evidence to be adduced at a trial.

In this case, the respondent was charged, from what I can make of the charge and after reading section 12(1)(g) of the Passport Act, with an offence of being in possession without lawful authority of two passports which were issued by the Republic of the Philippines not for her own use but for the use of two other persons, an offence under section 12(1)(g) of the Passport Act. The respondent pleaded guilty to the badly framed charge and the prosecution officer gave the court a statement of facts which, briefly stated, show that the police raided a hotel room at 3.40 a.m. on April 4, 1987 and found the respondent, a national of the Philippines, in possession of two passports issued by the Republic of Philippines to two persons, Lena I. Tabuzo and Corazon V. Hofilena respectively. The respondent admitted the facts but said that she was requested by her two friends to keep their passports and that they had gone to Ipoh. Now clearly if what she said is true, then she had lawful authority to keep the passports as the passport holders had requested her to keep the passports. And therefore the essential ingredient in the charge that the possession of the passports was without lawful authority was not made out. The magistrate should have rejected her plea of guilty as it did not constitute an unequivocal plea of guilty. As was stated by Chang Min Tatt J. (as he then was) in *Public Prosecutor* v. *Cheah Chooi Chuan*,[5] "... it is a cardinal principle that any plea of guilt must be completely unreserved, unqualified and unequivocal."

The proceedings before the magistrate must be regarded as a complete nullity. And I set aside the conviction and sentence of imprisonment and fine. It is up to the Public Prosecutor whether to recharge the respondent taking into account, presumably, whether the authorities can secure all necessary evidence for this case at this late stage.

Order accordingly.

PERSHOWA LEASING (M) SDN. BHD. v. KIN SHIPPING LINE SDN. BHD. & ORS.

[O.C.J. (Chong Siew Fai J.) July 17 & September 11, 1987]

[Sibu – Suit No. 60 of 1986]

Shipping – Lease agreement – Failure to pay rents – Summary judgment sought – Application for – Whether there was a bona fide defence.

Hire Purchase – Lease agreement and vessel-building agreement – Whether necessary to register them under the Hire Purchase Registration Ordinance (Cap. 71) – Hire Purchase Registration Ordinance, ss. 5 & 7(1).

The plaintiffs agreed to purchase a certain vessel from, and to be built by, the first defendant. Under the agreement, the first defendant was to take a lease of the vessel from the plaintiffs after the delivery of the vessel. By a lease agreement made on May 21, 1984 between the plaintiffs as the lessor and the first defendant as the lessee, the lessee agreed to a lease for 36 months. The second, third, fourth and fifth defendants jointly and severally guaranteed, *inter alia*, the punctual payment of the rent under the lease. The first defendant defaulted in the payment of the rent. As a result, the present action was instituted. The plaintiffs sought summary judgment against the defendants.

Held: the defendants have failed to set up any *bona fide* defence or raise any issue or question which ought to be tried or show that there ought for some other reasons to be a trial. Judgment should be given for the plaintiffs.

Cases referred to:

(1) *Vacher & Sons Ltd.* v. *London Society of Compositors* [1913] A.C. 107.
(2) *Black-Clawson International Ltd.* v. *Papierwerke Waldhof-Aschaffenburg A.G.* [1975] A.C. 591.
(3) *R.* v. *Bates & Anor.* [1952] 2 All E.R. 842, 844.
(4) *Rolled Steel Products (Holdings) Ltd.* v. *British Steel Corporation* [1985] 3 All E.R. 52.
(5) *Dunlop Pneumatic Tyre Co. Ltd.* v. *New Garage & Motor Co. Ltd.* [1915] A.C. 79.
(6) *Ford Motor Co. (England) Ltd.* v. *Armstrong* (1915) 31 T.L.R. 267.
(7) *Willson* v. *Love* [1896] 1 Q.B. 626.
(8) *Lombank Ltd.* v. *Excell* [1963] 3 All E.R. 486.
(9) *Phonographic Equipment (1958) Ltd.* v. *Muslu* [1961] 3 All E.R. 626.
(10) *Robophone Facilities Ltd.* v. *Blank* [1966] 1 W.L.R. 1428.
(11) *Alec Lobb Ltd.* v. *Total Oil GB Ltd.* [1983] 1 All E.R. 944.
(12) *Alec Lobb Ltd.* v. *Total Oil GB Ltd.* [1985] 1 All E.R. 303.
(13) *Multiservice Bookbinding Ltd.* v. *Marden* [1978] 2 All E.R. 489.

APPLICATION.

Lily Y.K. Wong (Ms) for the plaintiffs.
Hii Hieng Sing for the defendants.

Cur. Adv. Vult.

Chong Siew Fai J.: This is an application by the plaintiffs for judgment against the five defendants in the sum of $1,264,130.83 with interest and costs under Order 14 of the Rules of the High Court 1980 on the ground that there is no defence to the plaintiffs' claim or, alternatively, under Order 18 rule 19 of the said Rules on the ground that the defence filed discloses no reasonable cause of defence or is frivolous or vexatious or is otherwise an abuse of the process of the court.

The application is supported by the affidavit of Kho Hong Heng, the branch manager of the plaintiff-company made on August 29, 1986, and the defendants through the third defendant, Wong Liong Kiong, filed an affidavit made on February 7, 1987 opposing the application.

The background leading to the institution of this action may be briefly stated as follows:

(a) By an agreement made on May 21, 1984 between one Batang Rejang Shipyard Sdn. Bhd. of the first part, the first defendant, Kin Shipping Line Sdn. Bhd. of the second part and the plaintiffs of the third part, the plaintiffs agreed to purchase a steel semi container/cargo vessel (hereinafter referred to as "the vessel") from and to be built by the said Batang Rejang Shipyard Sdn. Bhd. in the sum of $1,600,000.00. It was expressly stated that the plaintiffs entered into this purchase agreement at the request of the first defendant who was therein termed 'the operator'. Under this agreement, the first defendant had certain obligations such as supervising the construction of the vessel, modifying or altering the plans and specifications of the vessel, accepting delivery of the vessel upon completion thereof. The first defendant was also to commence taking a lease of the vessel from the plaintiffs immediately upon acceptance of the delivery of the vessel.

(b) By a lease agreement also made on May 21, 1984 between the plaintiffs as the lessor and the first defendant as the lessee, the first defendant agreed to take on lease the vessel for a period of 36 months commencing from the delivery of the vessel and/or the date of issuance of the certificate of acceptance of the delivery of the vessel.

(c) It is not disputed that:

(i) The certificate of acceptance of the delivery of the vessel was issued on November 1, 1985. With reference to the lease agreement, this means the 36-month period began from November 1, 1985.

(ii) The first defendant had paid the first month rental of $35,696.00 and another similar sum representing the rental for the last month of the leasing period.

(d) By a guarantee and indemnity agreement also made on May 21, 1984, the second, third, fourth and fifth defendants jointly and severally guaranteed, *inter alia,* the due and punctual payment by the first defendant as lessee of all the rents, overdue interest and other sums due under the lease agreement, and in default whereof, undertook to pay forthwith on demand all such sums to the plaintiffs as lessor and to indemnify the plaintiffs as lessor against all losses, charges and damages incurred or suffered by the plaintiffs as lessor in consequence of any failure by the first defendant as lessee to perform any of the lessee's obligations under the lease agreement.

(e) From the month of December 1985, the first defendant had defaulted in the payment of the monthly rent. After a demand in writing dated February 17, 1986 was addressed to the first defendant with copies to each of the other defendants, no payment was made. This action was instituted on April 12, 1986.

By their defence dated May 17, 1986 and the affidavit of the third defendant made on February 7, 1987, the defendants raised a number of issues. However, at the hearing of this application, several were abandoned. The forsaken issues are:

(a) *Respecting the vessel-building (tripartite) agreement:*

(i) That the agreement was not properly stamped and registered as required under the Stamp Ordinance (Cap. 32) (part of paragraph 2(a) of the third defendant's affidavit; part of paragraph 1(a) of the defence).

(ii) That the agreement had not been properly sealed and executed as required by the articles of association of the first defendant-company (paragraph 1(b) of the defence).

(iii) That the transaction contained in the agreement was *ultra vires* the objects of the first defendant-company and/or *ultra vires* the

powers of the directors (paragraph 1(c) of the defence).

(b) *Respecting the lease agreement:*

(i) That the purported subject-matter lacks certainty (paragraph 3(b) of the defence).

(ii) That the execution of the lease agreement did not comply with the articles of association of the first defendant-company and that the said agreement was *ultra vires* the first defendant and/or the powers of the directors (paragraph 3(d) and (e) of the defence).

(c) *Respecting the guarantee and indemnity agreement:*

That it was not properly stamped and registered according to the law (paragraph 5(c) of the defence).

While the usual mode by which a defendant contests the plaintiffs' application for summary judgment is by affidavit on the merits, it may be noted that in the instant case several issues or grounds, though alleged in the defence, were not mentioned in the third defendant's affidavit in opposition.

I shall now proceed to deal with the submission by Mr. Hii Hieng Sing, counsel for the defendants.

Firstly, it was contended that the vessel-building (tripartite) agreement and the lease agreement were void, invalid and legally unenforceable or not binding on the contracting defendants because they were not registered under the Hire Purchase Registration Ordinance (Cap. 71) or according to the law (paragraph 2(a) of the third defendant's affidavit; paragraph 1(a) and paragraph 3(c) of the defence). The point of law raised was not clearly and explicitly stated as it should have been. However, at the hearing of the application, it was made clear that the contention of the defence was that the agreements should have been registered under the said Ordinance because of the preamble thereto and section 7(1) thereof. No authority was cited in support of this contention. It was, however, conceded that the two agreements were not hire-purchase agreements.

With respect, I find the defence contention unacceptable.

Section 7(1) of the Hire Purchase Registration Ordinance provides:

"No document shall be registered which –

(a) evidences any illegal or gambling transaction, or any other transaction which is not enforceable in a court; or

(b) binds a minor or person of unsound mind to any obligation or liability, unless the document is signed on his behalf by a guardian or committee duly appointed by the appropriate court and authorized to sign such document."

To my mind the said section 7(1) is clear and unambiguous. It merely excludes documents of certain types or nature from registration. It does not require the documents of the kinds we are now dealing to be registered under the said Ordinance. In fact, apart from section 4 thereof providing for compulsory registration of hire-purchase instruments relating to movable property which has no application to the instant case because, as conceded by the defence, the two documents in question are not hire-purchase agreements, section 5 of the Ordinance merely permits registration of documents at the request of parties subject to certain exceptions which are either irrelevant or do not apply to our instant case.

Now, what about what is termed as the "preamble" to the said Ordinance? Counsel referred to the heading appearing at the beginning of the Ordinance. It states:

"An Ordinance to make better provision in the law relating to the registration of hire purchase and other agreements."

I would mention in passing that I do not think the said heading is known as the "preamble" to the Ordinance, but rather the "title" or, perhaps, the "long title" of the Ordinance since there is already in being a short title. (See section 1 of the Ordinance.) The long title of a statute usually contains a general statement of the legislative purpose, which is really what the phrase quoted above does whereas the preamble, which nowadays is rarely used, sets out the facts and assumptions upon which the statute is based.

Reverting to the issue in point, it seems to me that counsel for the defendants was relying on the long title to support his contention that the two agreements in question must be registered under the said Ordinance. With respect, I do not think it can be used in that manner. Authorities show that the long title may be looked at for the purpose of interpreting the statute as a whole and ascertaining

its scope. (See *e.g. Vacher & Sons Ltd.* v. *London Society of Compositors*[1]; *Black-Clawson International Ltd.* v. *Papierwerke Waldhof-Aschaffenburg A.G.*[2]) It may not be used to contradict the clear and unambiguous language of a particular provision of the statute. Thus, as Donovan J. stated in *R.* v. *Bates & Anor.*[3]:

"In many cases the long title may supply the key to the meaning. The principle, as I understand it, is that where something is doubtful or ambiguous the long title may be looked to to resolve the doubt or ambiguity, but, in the absence of doubt or ambiguity, the passage under construction must be taken to mean what it says, so that, if its meaning be clear, that meaning is not to be narrowed or restricted by reference to the long title."

In the instant case, for the purpose of the issue in this application, section 7(1) of the Hire Purchase Registration Ordinance is clear and unambiguous; so there is no question of calling the long title of the said Ordinance in aid to clear doubt or ambiguity. Furthermore, even if the long title is allowed to be used in the manner as seemingly contended by counsel (which, in my opinion, is not permissible), the long title in no way suggests that the two types of agreements as in our instant case need to be registered under the said Ordinance. This ground therefore must fail.

Next, it was contended that the vessel-building (tripartite) agreement and the lease agreement were void, invalid and unenforceable or not binding on the first defendant on the ground that they related to transactions involving values exceeding the nominal capital of the first defendant-company which was $250,000.00. No authority was cited for this argument. I find the contention devoid of merit. As regard the question of *ultra vires,* which was what counsel for the defendants in effect suggested, the term *"ultra vires"* should be applied only to acts outside the corporate capacity of a company, not to acts merely in excess or in abuse of its powers (*Rolled Steel Products (Holdings) Ltd.* v. *British Steel Corporation*[4]). In the instant case, there was not even suggestion that the agreements or transactions were *ultra vires* any of the objects of or powers as defined by the Memoranda of Association of the first defendant-company. Moreover, assuming that the first defendant had no capacity to enter into the agreements, section 20(1) of the Companies Act 1965 provides to the effect that no act of a company (including the entering into of an agreement) is to be invalid by reason only of the fact that the company lacked capacity or power to do the act. In our instant case, the vessel had been constructed and the certificate of acceptance of delivery of the vessel had been issued, the plaintiffs had substantially performed their part of the contracts; it is only just and proper that section 20(1) must come in aid.

In another contention, counsel for the defendants refers to the arbitration clause (clause 23) in the vessel-building (tripartite) agreement (paragraph 3 of the third defendant's affidavit and paragraph 2 of the defence). The submission of counsel in this respect is not quite clear. It appears, as in fact is often the case in contentions of this nature, the point taken was that this action should be stayed because of the arbitration clause in the vessel-building agreement. I find the contention of no help to the defendants. The claim of the plaintiffs, as conceded by counsel for the defence, is based on the lease agreement. Though the statement of claim made reference to the vessel-building agreement, the claim of the plaintiffs could have been drafted without reference to it. The lease agreement, from which the claim arose, does not contain any arbitration agreement or clause. Nor does it, expressly or by implication, incorporate into it the arbitration clause in the vessel-building agreement. Nor could the vessel-building agreement be in any way properly construed as having its arbitration clause extended to the lease agreement thereby forming part of the latter.

An additional ground that the contention would fail is that by filing an affidavit contesting this application for summary judgment under Order 14 and disputing the claim, the defendants probably had taken a "step in the action"; moreover, no summons for stay of this action had, in the meantime, been taken out. (See *Russell on Arbitration* 12th Ed. p. 173.)

It was then argued that the lease agreement was void, invalid and legally unenforceable or not binding on the first defendant because on the date of the execution of the agreement (May 21, 1984), the subject-matter of the agreement, *i.e.* the vessel, was non-existent (paragraph 4 of the third defendant's affidavit; paragraph 3(a) of the defence). I have no hesitation in rejecting this contention. There is abundant evidence that it is within the contemplation of the parties at the time of entering into the lease agreement that the vessel was to be built. (See, for example, the vessel-building (tripartite) agreement.) Under the lease agreement, the lease period of 36 months was to commence "from the time of delivery and/or the date of issuance of certificate of acceptance of

delivery" by the first defendant. There is uncontroverted evidence that the certificate of acceptance of delivery was issued by the first defendant on November 1, 1985 (see exh. "KHH 3" annexed to Kho Hong Heng's affidavit made on August 29, 1986). At the request and on the stipulation of the first defendant to take a lease of the vessel, the plaintiffs had financed the construction and purchased the vessel. The vessel had come into being. The lease commenced from the issuance of the certificate aforesaid. There had been whole or substantial performance on the part of the plaintiffs. Viewing from whichever angle, the lease agreement is valid and binding on the first defendant. The defence contention must fail.

Finally, it was contended:

(a) That the plaintiffs had no right to declare the total rent or any part thereof immediately due and payable (paragraph 6 of the defence).

(b) That the provision contained in article 13(1)A of the lease agreement, which allowed the plaintiffs to declare a part or the entire rental thereunder and all other costs and expenses immediately due and payable, was void, null and of no legal effect on the grounds that:

(i) it was a penalty clause; and/or

(ii) it was harsh, unreasonable and unconscionable and against public policy and imposed by the economically stronger plaintiffs on the economically weaker first defendant (paragraph 5 of the third defendant's affidavit and paragraph 4 of the defence).

It will be noted from the defence and the third defendant's affidavit and defence counsel's submission, which was brief, that the attack was not on the quantum of the claim sought in the action but rather on article 13(1) of the lease agreement, more particularly article 13(1)A.

Article 13(1) provides:

"If the lessee fails to pay the rent provided for in article 3 hereof after the same becomes due and payable, or if the lessee fails to observe or perform any provision of this lease agreement the lessor shall have any one or more of the following remedies without having to give any prior notice or demand to the lessee:

A. to declare a part of or the entire amount of the total rent payable under this lease agreement and all other costs and expenses immediately due and payable;

B. to withdraw the vessel from the lessee or demand its return;

C. to terminate this lease agreement and to look to the lessee for compensation for all direct and consequential damages including loss of profits."

Through cases spanning over two centuries, the courts have formulated rules as guidance for distinguishing whether a particular contractual provision amounts to a penalty or liquidated damages: one of the leading cases being *Dunlop Pneumatic Tyre Co. Ltd.* v. *New Garage & Motor Co. Ltd.*[5] where the test was propounded. See also *Ford Motor Co. (England) Ltd.* v. *Armstrong*[6]. It is a question of construction and one of law to be decided upon the terms and inherent circumstances of each particular contract, judged as at the time of the making of the contract, not as at the time of the breach: *Willson* v. *Love*[7]; *Dunlop Pneumatic Tyre Co. Ltd.* v. *New Garage & Motor Co. Ltd.*[5] at p. 86. The importance and materiality of the circumstances prevailing at the time of the making of a contract cannot be over-emphasized as may be illustrated by comparative consideration of *Lombank Ltd.* v. *Excell*[8] and *Phonographic Equipment (1958) Ltd.* v. *Muslu*[9] where a similarly worded clause appeared in each of these two cases and it was held to be a penalty clause in the former case but to stipulate for liquidated damages in the latter case.

The onus of showing that a stipulation in a contract is a "penalty clause" lies upon the party who is sued upon it: *Robophone Facilities Ltd.* v. *Blank*[10]. In our instant case, no basis or foundation was laid or reasons given either by affidavit evidence, or by pleading or submission of counsel for the contention that article 13(1)A or, for that matter, article 13(1) is a "penalty clause". There was a bare allegation. For this reason alone the contention would fail.

I would, however, venture to consider further. From the vessel-building tripartite agreement, it appears obvious the plaintiffs agreed to buy the vessel to be constructed at the request of the first defendant. The purchase price, subject to adjustments (see article 5 of the agreement), was $1,600,000.00 (see article 2(a) thereof). The vessel was to be operated by the first defendant. During the construction of the vessel, the supervision and inspection of the works and modifications to the vessel, if any, were to be by the first defendant (articles 4 and 5 of the vessel-building agreement). So were the acceptance of the delivery of the vessel, when completed, and the issuance of

the certificate of such acceptance thereof (article 8 of the vessel-building agreement; article 4 of the lease agreement). It appears clear that the role of the first defendant well exceeded that of a mere lessee in an ordinary transaction and that the plaintiffs were a financier in the building of the vessel. The total rental for the whole 36 months under the lease would come to $1,285,056.00 ($35,696.00 x 36).

In *Dunlop Pneumatic Tyre Co. Ltd.* v. *New Garage & Motor Company Ltd.*[5] at p. 86, Lord Dunedin said:

"The essence of a penalty is a payment of money stipulated as in terrorem of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage ... The question whether a sum stipulated is penalty or liquidated damages is a question of construction to be decided upon the terms and inherent circumstances of each particular contract, judged of as at the time of the making of the contract, not as at the time of the breach."

It would appear clear that for the application of the test, there must be a sum stipulated or a fixed sum or a sum that can be ascertained by the provision in the contract concerned. In our present case, the remedies under article 13 of the lease agreement are flexible. It is not a case where there is no alternative or choice but with only one set formula upon which only one sum can be ascertained. It is, of course, possible that a sum claimed by a lessor may be excessive, but that would be through the choice of the remedies stipulated under article 13, and not on account of application of a set and rigid formula under the agreement. To put it in another way, article 13 of the lease agreement does not stipulate a fixed sum in the event of a breach. The remedies open to the plaintiffs as lessor were "any one or more" of items A, B and C. Under item A (the item under which the plaintiffs claim), the rental subject to being declared due and payable is flexible and not rigid as the wording "a part of or the entire amount" shows.

The defendants have failed to establish that article 13(1) of the lease agreement or, more particularly, article 13(1)A is a penalty clause. It is also my conclusion that on the background and circumstances prevailing at the time of the entering of the contracts as may be gathered from the affidavit evidence and the pleadings and taking the lease agreement as a whole with due regard to the terms and conditions therein, article 13(1) or, more particularly, article 13(1)A (under which the claim of the plaintiffs is substantively founded) does not, in law, amount to a penal provision.

As regards the contentions that article 13(1)A of the lease agreement was harsh, unreasonable, unconscionable against public policy and imposed by the economically stronger plaintiffs on the economically weaker first defendant, they are nothing more than bare allegations.

In *Alec Lobb Ltd.* v. *Total Oil GB Ltd.*[11], Peter Millet Q.C., after referring to counsel's contention of the transaction being harsh and unconscionable, said (p. 961):

"...; for the word 'unconscionable' seems to relate both to the terms of the bargain and to the behaviour of the stronger party. It is not enough to show that the bargain was a hard or unreasonable one; it must be shown that 'one of the parties to it has imposed the objectionable terms in a morally reprehensible manner, that is to say, in a way which affects his conscience': see *Multiservice Bookbinding Ltd.* v. *Marden* [1978] 2 All E.R. 489 at 502; [1979] Ch. 84 at 110 per Browne-Wilkinson J."

Alec Lobb Ltd.'s case went to the English Court of Appeal[12] where Dillon L.J. referring to *Multiservice Bookbinding Ltd.* v. *Marden*[13] said (at p. 313):

"I agree with the judgment of Browne-Wilkinson J. ... which sets out that to establish that a term is unfair and unconscionable it is not enough to show that it is objectively unreasonable."

A little later, on the same p. 313, he went on:

"Inequality of bargaining power must anyhow be a relative concept. It is seldom in any negotiation that the bargaining powers of the parties are absolutely equal. ...

The courts would only interfere in exceptional cases where as a matter of common fairness it was not right that the strong should be allowed to push the weak to the wall."

In our present case, no foundation, basis or reasons at all was laid or given to support any of the allegations put forward.

The contentions of the defendants fail dismally.

As to the argument that the plaintiffs had no right to declare the total rent or any part thereof immediately due and payable, the source of entitlement for the plaintiffs to so declare comes from article 13(1)A of the lease agreement. Since my opinion is that the said article 13(1)A is not penal in nature, the defence argument must fail.

As regards the guarantee and indemnity agreement executed by the second, third, fourth and

fifth defendants, counsel for the defendants submitted at the hearing that it stood or fell dependent upon the validity of the lease agreement. In the view I take of the validity of the latter, the defences of these defendants must therefore fail.

Having heard submissions by counsel and having considered the pleadings and the evidence adduced by the parties, I am satisfied that the defendants have failed to set up any *bona fide* defence or raise any issue or question which ought to be tried or show that there ought for some other reason to be a trial. There will be judgment for the plaintiffs against all the defendants in this action in the sum of $1,264,130.83 with interest at 8% per annum from to-day until payment and costs. In the absence of an agreement between the parties, the costs are to be taxed.

Order accordingly.

Solicitors: *Tiong Lim & Wong Co., Hii & Co.*

UNITED MALAYAN BANKING CORPN. BHD. v. SYARIKAT PERUMAHAN LUNAS SDN. BHD.

[O.C.J. (Edgar Joseph Jr. J.) January 15, 1988]

[Penang – Originating Summons No. 31-855-86]

Civil Procedure – Application to set aside ex parte order – Order of sale of land – Whether court was functus officio once order of sale was perfected – R.H.C. 1980, O. 28 r.4(1), O. 32 r. 5(3) – Courts of Judicature Act 1964, s. 68(2).

This was a defendant's application by way of summons-in-chambers to set aside an order of sale of certain land which is the subject matter of a charge executed by the defendant in favour of the plaintiff by way of security for an overdraft facility. A preliminary objection was raised by counsel for the plaintiff that the court was *functus officio* once the order of sale was perfected.

Held: (1) for the reasons urged by counsel for the defendant, the court had no hesitation in overruling the preliminary objection;

(2) the court did not consider that Order 32 rule 5(3) of the Rules of the High Court 1980 had any relevance to the issue which arose before the court because the court was not concerned here with an application to re-hear a summons but an application to revoke an *ex parte* order. Nor, for that matter, did the court consider the case of *Hamzah bin Abdul Majid and Anor.* v. *Sungei Way Leasing Sdn. Bhd.*(3) of any relevance because there the decision in question was one arrived at after an *inter partes* hearing so that Order 28 rule 4(1) was without application;

(3) in the circumstances, the court directed that the hearing of the application should proceed on the merits.

Cases referred to:

(1) *United Overseas Bank Limited* v. *Chung Khiaw Bank Limited* [1968] 2 M.L.J. 85 (consd and apprvd).

(2) *Craig* v. *Kanseem* [1943] 1 All E.R. 108 at 113 (consd and apprvd).

(3) *Hamzah bin Abdul Majid and Anor.* v. *Sungei Way Leasing Sdn. Bhd.* [1986] 1 M.L.J. 471 (distd).

ORIGINATING SUMMONS.

K. Balasundram for plaintiff.

N. G. Sivanandan (*Dominic Y. H. Lai* with him) for defendant.

Cur. Adv. Vult.

Edgar Joseph Jr. J.: This was a defendant's application by way of summons-in-chambers to set aside an order of sale of certain land comprised in Lot 40(2) Section 14, Bandar Georgetown, Penang, N.E.D., Penang, the subject matter of a charge bearing Presentation No. 15364/83 Vol. 285, Folio 156 executed by the defendant in favour of the plaintiff by way of security for an overdraft facility upon the following grounds:

(i) that Charge Presentation No. 15364/83 Vol. 285, Folio 156 over Lot No. 40(2), Section 14, Bandar Georgetown, Penang, N.E.D., Penang is void by reason that at the time of the creation and/or execution thereof by the defendants on February 11, 1983 the defendants were not the proprietors of the said Lot No. 40(2) and in the circumstances did not have the legal capacity to create and/or execute the said charge; and/or

(ii) that on February 11, 1983, the said Lot No. 40(2) was held under Leasehold Document of Qualified Title No. H.S. (D) 19, Section 14, Bandar Georgetown, N.E.D., Penang with a restriction in interest preventing the charging of the said land without the written sanction of the state authority and that such written sanction at the material time had not been had and obtained; and/or

(iii) that the provision of section 257(2) of the National Land Code have not been complied with in that the court has not directed that the different lots be offered for sale individually and in a specified order and also that in the